IN THE HIGH COURT OF BOMBAY AT GOA

APPLN. FOR APPOINTMENT OF ARBITRATOR NO.8 OF 2005.

Thomas Cook (India) Ltd.,
a Company incorporated under
the provisions of the Companies
Act, 1956 having its registered
office at Thomas Cook Building,
Dr. D. N. Road, Fort, Mumbai,
400 001. .. Petitioner.

Versus

Beach Ark Hotels Limited
a Company incorporated under
the provisions of the Companies
Act, 1956 having its Registered
office at House No.426, C/o.
Dr. Maurelio Furtado,
Varca, Salcete, Goa. .. Respondents.

Mr. M. S. Usgaonkar, Sr. Advocate with Sudesh Usgaonkar, Advocate for the applicant.

Mr. F. M. Reis, Advocate for the respondent.

Coram :- **R. S. MOHITE, J.**

Date : - 28 th September, 2007.

ORAL JUDGMENT :

This is an application U/s.11 of the Arbitration Act, 1996 for appointment of an arbitrator. It is the case of the applicant that by an agreement dated 22nd May,2001 executed with the respondent, an amount of Rs.1 Crore 7 Lacs was paid to the respondent. The repayment of the amount was to be done under clause 1 of the said agreement. It is their case that full repayment was not done and there is balance of Rs 83,88,964.55/- remaining due and payable as on

19.1.2005. By a notice to the respondents dated 19.1.2005, the petitioners stated that a dispute had arisen and in view of clause 4 of the agreement dated 22nd May 2001, which provides for resolution of the dispute by an Arbitrator,the applicants were referring the dispute to the sole arbitration Mr. Ashwin Katkar, C.E.O. and managing director of Thomas Cook (India) Ltd., or a nominee to be nominated by him. I am informed that by a further letter dated 28.1.2005 the C.E.O. and managing director of the applicant informed the respondent that he was nominating justice Shri. G. D. Kamat (retired chief justice of Gujrat High Court and former judge of Bombay High Court) as arbitrator. I am informed that justice Kamat has accepted to arbitrate.

The contention is that there being an arbitration clause and since the respondent by their registered letter dated 6.4.2005, refused to refer the dispute to an arbitration, this application has been filed U/s.11.

On behalf of the respondent it was contended that there was no arbitration clause in existence. That they had raised a dispute covering the claim mentioned in the notice and had filed special civil suit No.101/2003 against the petitioners and one M/s. JMC Holidays Ltd. which was pending for adjudication. It was contended that the matter in dispute was already subjudice in the Court and as the applicants had failed to comply with the provisions of law by failing to apply to the Court for referring the matter to the arbitration as required by the provisions of law. The applicants had therefore, waived their purported right to refer the matter to arbitration and as such were precluded from raising dispute before any arbitrator.

After hearing both sides I find that the question of recovery of the alleged balance amount from the deposit of 1.7 Crores

is a matter which is directly covered by clause 1 of the agreement dated 22.5.2001. It was brought to my notice that clause 8 of the said agreement provided that in relation to any legal action proceeding arising out of or in connection with the contract, parties would submit to the jurisdiction to the Court of Mumbai. This clause however, must be harmoniously read with clause 4 which provides for dispute resolution and contains a broad arbitration agreement. Para. 3 of this clause 4 provides that Court at Mumbai shall have jurisdiction for the purposes of implementation of any arbitral award given under this clause. In my view, clause 8 which pertains to jurisdiction is required to be read with para.3 of clause 4and if both are read harmoniously, it will indicate that Mumbai Courts were to have jurisdiction for the purpose of implementation of any arbitral award implying thereby that clause 8 would apply after arbitration was completed and award was passed. As regards the contention raised on behalf of respondent that the petitioners, by not filing application for reference to arbitration in the suit pending in the Civil Court, by my separate judgment delivered in C.RA. No.3/2007 I have indicated as to how the cause of action occurring to the plaintiff in that suit is different from the cause of action as accruing to the petitioner in this application.

In the circumstances, I am inclined to allow this application.

Application is allowed in terms of prayer clause (a) and Justice G. D. Kamat, (Retired the Chief Justice, of Gujrat High Court and Former Judge of this Court) is appointed as arbitrator to resolve the dispute as raised in the petitioner's letter dated. 19.1.2005 and further claim of interest, if any,payable to the petitioners.

It made clear that all contentions permissible by law, excluding the contention of jurisdiction of the arbitrator raised on behalf of the respondent in relation to the aforesaid dispute are kept open for resolution by the arbitrator.

Application disposed off.

R. S. MOHITE, J.

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